Sitrac Corp Sdn Bhd v Lim Siew Eng

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO R1-12-163 OF 2000
ABDUL AZIZ J
12 JUNE 2002

Civil Procedure *— Appeal — Striking out — Whether decision to dismiss appellants' striking out application appealable — Courts of Judicature Act 1964 ss 27, 28*

The sessions court dismissed the appellants' (defendants in the sessions court) striking out application with costs. The appellants appealed. The respondent (the plaintiff in the sessions court), raised a preliminary objection in the appeal, submitting that the decision to dismiss the appellants' striking out application was not appealable and therefore the appeal should be dismissed in limine.

Held, dismissing the preliminary objection:

(1) The dismissal in this case of the appellants' striking out application was clearly not, a ruling made in the course of a trial or hearing of any cause or matter, and was therefore appealable. The dismissal was not made in the course of the trial of the respondent's action as the trial had not commenced. The dismissal was also not a ruling made in the course of the hearing of the striking out application, because the decision to dismiss the application was made after and not in the course of the hearing of the application. Moreover, a ruling made in the course of the hearing of an application must be a ruling on some point other than the ultimate question of whether the application is to be allowed or dismissed. The right to appeal from a particular decision can only be denied by clear words (see p 319B–D); *Dato' Seri Anwar Ibrahim v PP* [1999] 1 MLJ 321 followed.

(2) Whether a decision is a ruling that is excluded by the excluding clause in the definition of 'decision' in s 3 of the Court of Judicature Act 1964 ('the CJA') is a question of statutory interpretation of that clause. It is an incorrect approach to the interpretation of that clause to begin by asking the question whether the decision is a final order or an interlocutory order because the term 'final order' or 'interlocutory order' is not used in the excluding clause. The actual words used in the excluding clause have to be considered (see p 319G–H); *Kee Yeh Maritime Co Ltd v Coastal Shipping Sdn Bhd* [2000] 4 AMR 4190 and *Teoh Poh Keong Sdn Bhd v Shinhan Engineering & Construction Co Ltd* [2001] 2 MLJ 50 not followed and *Ratnam v Cumarasamy & Anor* [1962] MLJ 330 followed.

[Bahasa Malaysia summary

Mahkamah sesyen telah menolak permohonan pembatalan perayu (defendan-defendan di mahkamah sesyen) dengan kos. Perayu-

perayu telah membuat rayuan. Responden (plaintif di mahkamah sesyen), telah membangkitkan satu bantahan awal dalam rayuan tersebut, menghujahkan bahawa keputusan untuk menolak permohonan pembatalan perayu-perayu tidak boleh dirayui dan dengan itu rayuan tersebut haruslah ditolak in limine.

Diputuskan, menolak bantahan awal tersebut:

(1) Penolakan dalam kes ini akan permohonan pembatalan perayu-perayu adalah jelasnya bukan, merupakan satu keputusan yang dibuat dalam perjalanan sesuatu perbicaraan atau pembicaraan mana-mana kausa atau perkara, dan oleh itu boleh dirayu. Penolakan tersebut telah tidak dibuat dalam perjalanan perbicaraan tindakan responden kerana perbicaraan tersebut belum dimulakan. Penolakan tersebut juga tidak merupakan satu keputusan yang dibuat dalam perjalanan pembicaraan permohonan pembatalan itu, kerana keputusan untuk menolak permohonan tersebut telah dibuat selepas itu dan bukan dalam perjalanan pembicaraan permohonan tersebut. Lagipun, sesuatu keputusan yang dibuat dalam perjalanan pembicaraan sesuatu permohonan semestinya merupakan keputusan mengenai sesuatu perkara yang lain daripada persoalan terakhir sama ada permohonan tersebut dibenarkan atau ditolak. Hak untuk merayu daripada sesuatu keputusan yang khusus hanya boleh dinafikan dengan perkataan-perkataan yang nyata (lihat ms 319B–D) diikut.

(2) Sama ada sesuatu keputusan merupakan suatu arahan yang dikecualikan oleh fasal kekecualian dalam definisi 'decision' di dalam s 3 Akta Mahkamah Keadilan 1964 ('AMK') merupakan satu persoalan pentafsiran berkanun fasal itu. Ianya adalah pendekatan yang tidak betul kepada pentafsiran fasal itu untuk bermula dengan menanyakan soalan sama ada keputusan tersebut adalah perintah muktamad atau satu perintah interlokutori kerana ungkapan 'final order' atau 'interlocutory order' tidak digunakan di dalam fasal yang mengecualikan. Perkataan-perkataan sebenar yang telah digunakan di dalam fasal pengecualian perlu dipertimbangkan (lihat ms 319G–H); *Kee Yeh Maritime Co Ltd v Coastal Shipping Sdn Bhd* [2000] 4 AMR 4190 dan *Teoh Poh Keong Sdn Bhd v Shinhan Engineering & Construction Co Ltd* [2001] 2 MLJ 50 dan *Ratnam v Cumarasamy & Anor* [1962] MLJ 330 tidak diikut.]

Notes

For cases on striking out, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1220–1224.

Cases referred to

Dato' Seri Anwar Ibrahim v PP [1999] 1 MLJ 321 (refd)

Kee Yeh Maritime Co Ltd v Coastal Shipping Sdn Bhd [2000] 4 AMR 4190 (not folld)

A *Ratnam v Cumarasamy & Anor* [1962] MLJ 330 (not folld)
Seabance Ge Capital Sdn Bhd lwn Dynabuilders Sdn Bhd [2002] 5 MLJ 152 (refd)
Teoh Poh Keong Sdn Bhd v Shinhan Engineering & Construction Co Ltd [2001] 2 MLJ 50 (not folld)

B

Legislation referred to

Courts of Judicature Act 1964 ss 3, 27, 28
Subordinate Courts Rules Act 1955 s 4(b)
Subordinate Courts Rules 1980 O 14 r 21, O 49 r 1
C Supreme Court Ordinance 1958 s 3(1)

T Raj (*Nazri Aziz & Wong*) for the appellants/defendants.
Seah Ban Kiat (*Iza Ng Yeo & Kit*) for the respondent/plaintiff.

Abdul Aziz J: The appellants, who are the defendants in the action in the sessions court, failed in their bid in the sessions court to have the summons
D and the statement of claim in the action struck out under O 14 r 21 of the Subordinate Courts Rules 1980 ('the SCR'). The sessions court dismissed the striking out application with costs. The appellants now appeal. The respondent, who is the plaintiff in the action, has raised a preliminary objection in the appeal, the issue being whether the decision to dismiss the appellants' striking out application is appealable. The respondent maintains
E that, according to the Courts of Judicature Act 1964 ('the CJA'), it is not and therefore the appeal should be dismissed in limine.

The jurisdiction of the High Court to hear appeals in civil matters from subordinate courts is conferred by s 27 of the CJA, which provides as follows:

F > The appellate civil jurisdiction of the High Court shall consist of the hearing of appeals from subordinate courts as hereinafter provided.

Among the matters 'hereinafter provided' are those in s 28 of the CJA, which concerns the scope of the appellate civil jurisdiction and provides as follows:

G > (1) Subject to any other written law, no appeal shall lie to the High Court from a decision of a subordinate court in any civil cause or matter where the amount in dispute or the value of the subject matter is ten thousand ringgit or less except on a question of law.
>
> (2) An appeal shall lie from any decision of a subordinate court in any proceedings relating to maintenance of wives or children, irrespective of
H the amount involved.

In those two subsections the word 'decision' appears, which was defined originally in s 3 of the CJA as including 'judgment, sentence or order'. It being an including definition, the ordinary meaning of 'decision', which is a wide one, was not affected by the inclusion. In 1998, however, the
I definition was changed so as to exclude from the original definition 'any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties'. The intended effect of

the change on s 28 of the CJA is obviously to make it read as though, in any event, no appeal shall lie to the High Court from such a ruling of a subordinate court.

Section 4(b) of the Subordinate Courts Rules Act 1955 empowers the Subordinate Courts Rules Committee to make rules for, inter alia, 'regulating and prescribing the procedure in proceedings by way of appeal from a Subordinate Court to the High Court'. The rules are in O 49 of the SCR, where, in r 1, 'decision' is defined as including ' 'judgment', 'order' and 'decree' '. Like the original definition in the CJA, it is a wide definition. A provision, besides others, in O 49 of the SCR where the word appears and the definition therefore comes into play is, for example, r 2(2), which provides as follows:

> An appellant may appeal from the whole or any part of a decision and the notice of appeal shall state whether the whole or part only, and what part of the decision is complained of.

Since, however, the power to make rules conferred by s 4(b) of the Subordinate Courts Rules Act 1955 is confined to making rules of procedure, and the rules in O 49 of the SCR are therefore rules of procedure, the wide nature of the definition of 'decision' in r 1 cannot affect the operation of the definition of the word in the CJA, which definition goes to the substantive matter of the scope of the High Court's appellate jurisdiction. Therefore, notwithstanding the broad definition of 'decision' in O 49 r 1 of the SCR, no appeal shall lie to the High Court from a subordinate court in respect of 'any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties.

In contending that the dismissal of the striking out application is not appealable, learned counsel for the respondent focuses on the words 'does not finally dispose of the rights of the parties'. His submission comes down to this, that the rights of the parties will finally be disposed of only when the respondent's claim in the action is either dismissed or allowed, and that since the dismissal of the appellants' striking-out application leaves intact the respondent's claim as yet to be finally adjudicated, the dismissal of the striking-out application did not finally dispose of the rights of the parties and was therefore not a 'decision' and is not appealable.

That may be right as far as the words 'does not finally dispose of the rights of the parties' are concerned, but they are not the only words that need to be considered. The words 'ruling made in the course of a trial or hearing of any cause or matter' must not be overlooked. For a ruling to be not a 'decision', it is not enough that it does not finally dispose of the rights of the parties. The ruling must also be one made in the course of a trial or hearing of any cause or matter. Even if the dismissal of the striking out application did not finally dispose of the rights of the parties. the question must be considered whether it was a ruling made in the course of a trial or hearing of any cause or matter. If it was not, it is not excluded by the definition of 'decision' and is therefore appealable. That question has not been addressed by the respondent's counsel.

A clear example of a ruling made in the course of a trial of a cause or matter is a ruling on a question arising in the course of the trial — which ruling is, as it must necessarily be, made in the course of the trial — whether a particular document is admissible in evidence. A clear example of a ruling made in the course of a hearing of a cause or matter is where, in the course of the hearing of, say, an originating summons, a ruling is made, on a question arising in the course of the hearing, whether an affidavit ought to be disallowed.

The dismissal in this case of the appellants' striking out application was clearly not, in my opinion, a ruling made in the course of a trial or hearing of any cause or matter, and is therefore appealable. It is out of the question that it was made in the course of the trial of the respondent's action. The trial had not even commenced. Neither was it a ruling made in the course of the hearing of the striking out application, because the decision to dismiss the application was made after, not in the course of, the hearing of the application. Moreover, a ruling made in the course of the hearing of an application must be a ruling on some point other than the ultimate question whether the application is to be allowed or dismissed.

In my opinion, the right to appeal from a particular decision can only be denied by clear words.

I need to remark on one or two of the cases that have been cited.

In *Dato' Seri Anwar Ibrahim v PP* [1999] 1 MLJ 321, which was an appeal from a refusal of bail, there are indications at p 335 that the Court of Appeal did take into account the words 'ruling made in the course of a trial or hearing of any cause or matter', but the court considered that the refusal of bail was such a ruling and that the ruling did not finally dispose of the rights of the appellant.

My opinion that the dismissal of the appellants' striking out application is appealable is at odds with the decisions of Richard Malanjum J in *Kee Yeh Maritime Co Ltd v Coastal Shipping Sdn Bhd* [2000] 4 AMR 4190 and *Teoh Poh Keong Sdn Bhd v Shinhan Engineering & Construction Co Ltd* [2001] 2 MLJ 50. That is necessarily so because Richard Malanjum J, it would seem, was not, or did not feel, called upon to consider the words 'ruling made in the course of a trial or hearing of any cause or matter'.

Whether a decision is a ruling that is excluded by the excluding clause in the definition of 'decision' in s 3 of the CJA is a question of statutory interpretation of that clause. In my opinion it is, I say with respect, an incorrect approach to the interpretation of that clause to begin, as it seems to me was done by Richard Malanjum J and the respondent's counsel in his written submission, by asking the question whether the decision is a final order or an interlocutory order, and I say so because the term 'final order' or 'interlocutory order' is not used in the excluding clause. It is the actual words used in the excluding clause that have to be considered. The position here is different from that in *Ratnam v Cumarasamy & Anor* [1962] MLJ 330, where, because those terms appeared in s 3(1) of the Appeals from the Supreme Court Ordinance 1958, which was the statutory provision in question, the Court of Appeal had to embark upon a consideration of the

question when an order is final and when it is interlocutory. In the two cases decided by Richard Malanjum J and in the written submission of the respondent's counsel in this case, the preoccupation with the inquiry into the meaning of 'final order' and 'interlocutory order' — terms not used in the excluding clause — and the impact of the result of the enquiry, namely, that a final order is one that finally disposes of the rights of the parties, and an interlocutory order is one that does not, which impact brings into prominence the second part of the excluding clause, might have eclipsed the words of the first part and the value of those words.

Those words were also not considered in *Seabance Ge Capital Sdn Bhd lwn Dynabuilders Sdn Bhd* [2002] 5 MLJ 152 because they were not a point taken up in argument.

I dismiss the preliminary objection.

Preliminary objection dismissed.

Reported by Ezatul Zuria Azhari